80-1539

NO.

Office-Supreme Court, U.S.
FILED
MAR 12 1981
L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID CARSON JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT ~~AND BRIEF~~

William H. Haboush
2120 Staples Mill Road
Richmond, Virginia 23230
(804)257-7229

Counsel for Petitioner

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 1980

DAVID CARSON JACKSON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, David Carson Jackson, by counsel, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit entered on February 13, 1981.

QUESTIONS PRESENTED

I. Whether the Government failed to fulfill its burden of proof to establish that the Petitioner participated in an illegal gambling business which had been in substantially continuous operation for a period in excess of thirty (30) days.

II. Whether the Government failed to adduce proof sufficient to demonstrate that the Petitioner was involved in an "illegal gambling business".

III. Whether the trial court erred in denying Petitioner's motion for a new trial.

TABLE OF CONTENTS

Questions Presented ii

Table of Authorities v

Opinions Below 2

Jurisdiction 3

Statutory Provisions Involved . . . 3

Statement of the Case 7

Reasons for Granting the Writ . . . 8

I. The Government failed to fulfill its burden of proof to establish that the Petitioner participated in an illegal gambling business which had been in substantially continuous operation for a period in excess of thirty (30) days. 8

II. The Government failed to adduce proof sufficient to demonstrate that Petitioner was involved in an "illegal gambling business". 23

III. The trial court erred in denying Petitioner's Motion for a New Trial after newly discovered evidence indicated that there was misconduct on the part of the Government's informant. . . 30

Table of Contents, Cont. Page

Conclusion 42

Appendix A 43

Certificate 46

TABLE OF AUTHORITIES

Cases	Page
Mesarosh v. United States, 352 U.S. 1 (1956)	36
Sanabria v. United States, 437 U.S. 54 (1978).	23
United States v. Avarello, 592 F.2d 1339 (5th Cir. 1979)	11
United States v. Bourg, 598 F2d 445 (5th Cir. 1978) .	31
United States v. Boyd, 566 F.2d 929 (5th Cir. 1978).	33
United States v. Campion, 560 F.2d 751 (6th Cir. 1979).	28
United States v. Carlone, 603 F.2d 63 (8th Cir. 1979) .	35
United States v. Clements, 588 F.2d 1030 (5th Cir.), cert. denied, 431 U.S. 936 (1979)	11,24,27,32
United States v. Curry, 530 F.2d 636 (5th Cir.), cert. denied sub nom. Hemingway v. United States, 429 U.S. 829 (1976)	29
United States v. Garrison, 296 F.2d 461 (7th Cir. 1961), cert. denied, 369 U.S. 804 (1962).	36

Table of Authorities, Cont.

Cases, Cont. — Page

United States v. Gresko, 632 F.2d 1128 (4th Cir. 1980). 18

United States v. Lipowski, 423 F. Supp. 864 (D.N.J. 1976) 40

United States v. McCoy, 539 F.2d 1050 (5th Cir. 1976). 28

United States v. Morris, 612 F.2d 483 (10th Cir. 1979) 31

United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978) 19

United States v. Tarter, 522 F.2d 520 (6th Cir. 1975) . 23,27

Williams v. United States, 500 F.2d 105 (9th Cir. 1974) . 37

Statutes and Rules

18 U.S.C. Section 1955 (Supp. 1980) . . . . . passim

18 U.S.C. Section 1955 (a) (Supp. 1980) 23

18 U.S.C. Section 1955 (b) (1) (ii) (Supp. 1980) 31

18 U.S.C. Section 1955 (b) (1) (iii) (Supp. 1980) 12,16,22

Table of Authorities, Cont.

Cases, Cont. Page

Fed. R. Crim. R. 33 5,34

Other Authority

2 Wright and Miller, Federal Practice and Procedure: Criminal Section 557 (1969) 36

H.R. Rep. No. 1549, 91st Cong., 2d Sess. 2, reprinted in (1970) U.S. Code Cong. & Ad. News 4029 . . 25

APPENDIX A 43

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

DAVID CARSON JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
April 9, 1980, Judgment
entered against Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
February 13, 1981, Judgment
of district court affirmed

OPINIONS BELOW

The decision below by the Circuit Court of Appeals for the Fourth Circuit is an unpublished memorandum decision which is set out in full as Appendix A. The opinion below by the United States District Court for the Eastern District of Virginia is an unpublished decision which was read in open court.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered on February 13, 1981. This petition for certiorari was filed within thirty (30) days of that date, as prescribed by S.Ct.R. 22(2) (1976). This Court's jurisdiction is invoked under 23 U.S.C. Section 1254 (1) (1966).

STATUTORY PROVISIONS AND RULES INVOLVED

18 U.S.C. Section 1955

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section-

(1) "illegal gambling business" means a gambling business which-

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty (30) days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting loteries, policy, bolita or

numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Fed. R. Crim. R. 33

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court, without a jury, the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years

after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

The Petitioner, David Carson Jackson, was indicted by a federal grand jury sitting in Norfolk, Virginia, in September, 1979. The Petitioner, along with one Joseph Eugene Hazelwood, now deceased, and one Margaret Frances McKenzie, was charged with violations of 18 U.S.C. Section 1955 (Supp. 1980), which prohibits persons from conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business.

The Petitioner, together with Hazelwood and McKenzie, was tried before a jury in the United States District Court for the Eastern District of Virginia, Newport News Division, Judge J. Clavitt Clarke, Jr., presiding. The jury found the Petitioner to be guilty as charged and Judge Clarke committed him to custo-

dy for a period of four (4) years along with a fine of $20,000. Prior to and at the time of sentencing the Petitioner filed a motion for a new trial with the trial court on the basis of newly discovered evidence of the government informant who testified against them. This motion was denied by the trial court.

The Petitioner appealed the judgment of the district court to the United States Court of Appeals for the Fourth Circuit. The Petitioner raised therein the three grounds which are asserted here in support of their argument for reversal. On February 13, 1981, the Fourth Circuit affirmed the decision of the district court.

REASONS FOR GRANTING THE WRIT

I

THE GOVERNMENT FAILED TO FULFILL ITS BURDEN OF PROOF TO ESTABLISH THAT

THE PETITIONER PARTICIPATED IN AN ILLEGAL GAMBLING BUSINESS WHICH HAD BEEN IN SUBSTANTIALLY CONTINUOUS OPERATION FOR A PERIOD IN EXCESS OF THIRTY (30) DAYS.

The Petitioner was convicted of violating 18 U.S.C. Section 1955, which provides in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section-
>
> (1) "illegal gambling business" means a gambling business which-
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance,

manage, supervise, direct, or own all part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty (30) days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory

or possession of the United States.

In order to establish a violation of this statute, that a defendant is involved in a gambling business, it is necessary to prove that (1) there has been a violation of the law of a state, (2) five or more persons are involved in the operation of the business, and (3) the operation has continued more than thirty (30) days or grossed more than $2,000 in a single day. United States v. Clements, 588 F.2d 1030, 1037 (5th Cir.), cert. denied, 431 U.S. 936 (1979). In prosecutions under 18 U.S.C. Section 1955, the Government has the burden of proving the existence of an "illegal gambling business" beyond a reasonable doubt. United States v. Avarello, 592 F.2d 1339 (5th Cir. 1979).

The Petitioner first contends that

the prosecution's evidence was insufficient to prove the third essential element of the offense, that is, that the alleged "illegal gambling business" was in "substantially continuous operation for a period in excess of thirty (30) days". 18 U.S.C. Section 1955 (b) (1) (iii).[1]

The Government's case at trial consisted of the following proof:

(1) Sergeant Palmer D. Bowling of the Newport News Police Department testified that he and three other officers of that department maintained visual and photographic surveillance of the premises of Jackson's Used Auto Engines, Inc.,

---

[1]Since the government chose to rely at trial upon proof that the alleged "illegal gambling business" was in "substantially continuous operation" for more than 30 days, the "gross revenue clause" of the statute, 18 U.S.C. Section 1955 (b) (1) (iii) is not in issue here. The record is, moreover, barren of any evidence with respect to alleged "gross revenue" in this case.

during a period beginning on December 10, 1977, and ending on January 26, 1978. Sergeant Bowling testified that the surveillance was carried out on December 10, 21, and 22, 1977, and January 6, 11, 14, 17, 18, 19, 20, 25 and 26, 1978, (App. at 33). The facts indicate, however, that what the police termed "gambling activities" occurred on only five days: December 21, 1977, and January 6, 11, 17 and 18, 1978. (App. at 34, 37, 39-41.)

(2) The police surveillance indicated that on at least five occasions, the officers observed one Edwardo Robert Lowrey transport a small brown paper bag from the nearby 21st Street Newsstand to Jackson's Used Auto Engines, Inc. Sergeant Bowling testified that Lowrey removed the package from his coat and placed it inside a Volkswagen van, which was

parked adjacent to the above-mentioned premises. A short time later, the Petitioner's co-defendant, Joseph Hazelwood, would enter the Volkswagen vehicle, pick up the bag, and then leave in his car. (App. at 35-36, 42, 55, 64, 108.) On only two of these occasions, however, was Sergeant Bowling able to determine that Lowrey had actually placed a brown paper bag inside the Volkswagen. (App. at 63-64.)

(3) Robert G. Prime, a former paid informant for the Newport News police, testified that, while working as a taxi driver, he had transported Lowrey to "Jackson Motors", where Lowrey delivered a brown paper bag.

(4) The police conducted a search of the premises of Jackson's Used Auto Engines, Inc., on January 26, 1978. During that search, police seized (a) a calendar

which contained certain numbers and the birthday of co-defendant McKenzie (App. at 44), (b) certain slips of paper with numbers on them from a car owned and operated by the now-deceased defendant, Joseph Hazelwood, and (c) a white envelope, which was attached to Hazelwood's leg and which also bore paper slips containing numbers (App. at 124).

(5) Robert E. Fidella, a fingerprint specialist with the Federal Bureau of Investigation, admitted that the calendar and papers which were seized from the business premises did not contain the Petitioner's fingerprints. (App. at 162-63.)

(6) William L. Holmes, also an agent with the Federal Bureau of Investigation, testified that the slips of paper seized from the Petitioner's co-defendant, Joseph Hazelwood, were used in a "numbers" gambling operation, that the calendar

contained an entry indicating a winning slip (App. at 177), and expressed his opinion that the individual in possession of the calendar occupied a "managerial position" in a gambling organization (App. at 178).

The Government's evidence failed to establish an essential element of a violation of 18 U.S.C. Section 1955--that the alleged "illegal gambling business" was in "substantially continuous operation for a period in excess of thirty days." 18 U.S.C. Section 1955 (b) (1) (iii). The testimony of the police officers at trial established that the Petitioner and others were under surveillance for a mere 48 days (from December 10, 1977, to January 26, 1978) (App. at 33). Alleged gambling-type activity (Lowrey placing the brown paper bag in the Volkswagen van followed by Hazelwood's

removal of it) was observed on only five separate days (December 21, 1977, January 6, 11, 17, 18, 1978) (App. at 34, 37, 39-41). Thus, it is clear that the only suspicious activity which the surveilling officers observed took place between December 21, 1977, and January 18, 1978- a period of less than 30 days.

Further, Sergeant Bowling admitted that on only <u>two</u> of those occasions was he actually able to determine that Lowrey had actually placed a brown paper bag in the vehicle (App. at 63-64). The only evidence which the Government actually offered of anyone actually placing a bet with the alleged "illegal gambling business" was the testimony of the Government informant, Robert Prime, who testified that he had placed two bets with co-defendant McKenzie at the 21st Street Newsstand in January, 1978, (App. at 76).

Where the Government's evidence fails to show that five or more persons were involved in a gambling operation throughout a thirty-day period, the defendant's conviction cannot stand. For example, in United States v. Gresko, 632 F.2d 1128 (4th Cir. 1980), the court reversed a conviction for violation of 18 U.S.C. Section 1955. In that case, the government investigation lasted some four months and the evidence adduced at trial "consisted primarily of testimony by State police officers about bets they had placed in the various gambling establishments". Id. at 1130. The court reversed the conviction of one defendant because the evidence demonstrated at most that "there was only one short period, from October 31, 1978, to November 11, 1978, during which as many as three people took bets at Lou's Place". Id. at 1133.

When compared with the amount of evidence produced in other prosecutions under the statute, the amount adduced here was clearly insufficient. Comparison with a recent case from the Seventh Circuit, United States v. Nerone, 563 F. 2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978), is indicative. The court there stated that

> "The thirty-day requirement was satisfied because we think that there was sufficient evidence from which the jury could find that the dice and card games in Fox's basement were in "substantially continuous" operation for the statutory period. The evidence showed that, with but three exceptions, Fox's casino was in operation every weekend between the beginning

of September, 1974, and early May, 1975. The evidence thus showed an established pattern of operation at least two days every week for approximately eight months. Simple arithmetical calculations would support a jury inference that the games took place on more than thirty individual calendar days. Moreover, there was testimony that sometimes gambling commenced on Friday nights and continued into the succeeding Monday. Larry Dellomo, a salesman for Mobile World, Inc., testified that he had participated in gambling at Fox's basement approximately fifteen times, usually on Saturday or Sunday nights, during

> the period charged in the indictment. William Roscetti, a dentist, also testified that he had gambled in Fox's basement from five to eight times during the same period."

563 F.2d At 843. In the present case, the only testimony offered to support the charge that an "illegal gambling business" was in operation was that offered by the Government's informant, Robert Prime, who testified that he had placed wagers with co-defendant McKenzie on two occasions. Further, there was no evidence offered here which, in the words of Judge Pell, "would support a jury finding that the (gambling) took place on more than thirty individual calendar days." Id.

It is clear, therefore, that the Government failed to prove an essential

element of the offense charge-that the alleged "illegal gambling business" was in "substantially continuous operation for a period in excess of thirty days". 18 U.S.C. Section 1955 (b) (1) (iii). In the absence of such proof, the Petitioner's convictions should be reversed.

II

THE GOVERNMENT FAILED TO ADDUCE PROOF SUFFICIENT TO DEMONSTRATE THAT PETITIONER WAS INVOLVED IN AN "ILLEGAL GAMBLING BUSINESS".

As noted above, 18 U.S.C. Section 1955 is directed at anyone who "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business". 18 U.S.C. Section 1955 (a). "It is participation in the gambling business that is a federal offense." Sanabria v. United States, 437 U.S. 54, 70 (1978) (emphasis added). In order to sustain a conviction for violation of the statute by operating an "illegal gambling business" the Government must prove that there are "at least five persons who are active in its operation and share an interest in the success of the venture". United States v. Tarter, 522 F.2d 520, 526 (6th Cir. 1975). The statute is designed to

include those who perform a "'necessary function' in the operation of the enterprise". United States v. Clements, supra, 588 F.2d at 1039 (citations omitted).

Further, the intent of the legislature in enacting 18 U.S.C. Section 1955 clearly did not encompass the sort of activity that the government's evidence can establish in the case at hand.

> The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those

corrupt State and local officials who make it possible for them to function.

H.R. Rep. No. 1549, 91st Cong., 2d Sess. 2, reprinted in (1970) U.S. Code Cong. & Ad. News 4029. The few instances of suspicious activity alleged by the government on the instant facts simply do not fit within this clear expression of intent. As the cases discussed herein indicate, the federal courts which have considered analogous situations have acted to effectuate this intent by refusing to sustain convictions based upon such inadequate evidence.

In the present case, the Government has failed to adduce sufficient evidence demonstrating the Petitioner's participation in the alleged "illegal gambling business". The evidence showed that the Petitioner's now-deceased co-defen-

dant, Joseph Hazelwood, had numbers slips in his possession at the time of the abovementioned search and seizure of the premises of Jackson's Used Auto Engines (App. at 124). The Government offered evidence to show that on five occasions Lowrey left a paper bag in the Volkswagen van parked outside the premises and that Hazelwood later retrieved the bag from that location. (App. at 35-6, 42, 55, 64, 108). The only evidence offered against Petitioner Jackson was that (1) he associated with co-defendant Hazelwood (App. at 36), and (2) was present at Jackson's Used Auto Engines on January 26, 1978, when the premises were searched (App. 161-62). The fingerprint expert, Robert E. Fidella of the Federal Bureau of Investigation, testified that he did not find the fingerprints of the Petitioner on the calendar seized during

the abovementioned search.

In short, the evidence offered by the Government was insufficient to demonstrate that the Petitioner was "active" in the operation of the alleged "illegal gambling business". See United States v. Tarter, supra, 522 F.2d at 526. There is no indication that Petitioner Jackson ever had any involvement with any gambling activity that might have occurred.

When compared with recent decisions from other federal courts, it is clear that the Government did not produce sufficient evidence to justify Petitioner's convictions. For example, in United States v. Clements, supra, the Fifth Circuit held that there was sufficient evidence to support beyond a reasonable doubt a jury determination that the defendant performed a function necessary to the gambling operation where he (1)

rented a hotel room in a fictitious name which was used to conduct the operation, (2) allowed telephone lines in the room to be used for gambling and (3) he was the payee of a check issued in payment of gambling debts. 588 F.2d at 1039. On the other hand, in United States v. Campion, 560 F. 2d 751 (6th Cir. 1977), a prosecution for conducting an illegal gambling business, the court held that evidence showing that, on a given day, the defendant made five telephone calls reporting race results was insufficient proof beyond a reasonable doubt that he was and "integral participant" in the gambling business. In United States v. McCoy, 539 F.2d 1050 (5th Cir. 1976), the Fifth Circuit reversed a defendant's conviction under this statute where the evidence merely demonstrated that one bookmaker defendant merely discussed the

"line" information with another bookmaker defendant. Id. at 1061-62. See also United States v. Curry, 530 F.2d 636 (5th Cir.), cert. denied sub nom. Hemingway v. United States, 429 U.S. 829 (1976) (defendant's conviction would be reversed where evidence was insufficient to demonstrate her participation in illegal gambling business).

The evidence in the present case was insufficient to demonstrate that the Petitioner conducted, financed, managed, supervised, directed, or owned all or a part of the illegal gambling business which the Government alleged to have existed here. Therefore, his conviction should be reversed.

III

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR A NEW TRIAL AFTER NEWLY DISCOVERED EVIDENCE INDICATED THAT THERE WAS MISCONDUCT ON THE PART OF THE GOVERNMENT'S INFORMANT.

As was indicated above, the Government's informant, Robert G. Prime, testified that, while working as a taxi driver, he had transported Lowery from the 21st Street Newsstand to Jackson's Used Auto Engines "on numerous occasions" during December, 1977, and January, 1978. (App. at 73). Prime testified that Lowrey carried a "small paper bag" on those trips which Lowrey would deliver to "Jackson Motors". (App. at 74-75.)

Primes's teatimony was crucial to the Government's case because he was the only witness to offer testimony establishing an alleged "link" between the 21st Street Newsstand, whose proprietress was co-defendant McKenzie (App.

at 205) and Jackson's Used Auto Engines. The existence of such a "link" was essential to the Government's case because, without an interrelationship between the two businesses, the Government could not prove an essential element of the offense charged.

As noted above, 18 U.S.C. Section 1955 proscribes the operation of an "illegal gambling business" which "involves five or more persons". 18 U.S.C. Section 1955 (b) (1) (ii). The "five-person" requirement is jurisdictional, United States v. Bourg, 598 F.2d 445, 448 (5th Cir. 1979), and the jury is required under 18 U.S.C. Section 1955 to find that five or more persons "were involved in the gambling business". United States v. Morris, 612 F.2d 483, 486 n. 5 (10th Cir. 1979). The Government alleged the involvement of five

persons in the present case: (1) co-defendant McKenzie, proprietress of the 21st Street Newsstand; (2) Harvey Nathaniel Brown, a janitor at the newsstand, whose fingerprints were found on the slips of paper which were seized from co-defendant Hazelwood on January 26, 1978, (App. at 157-58); (3) Edwardo Lowrey, who is alleged to have carried a brown paper bag from the 21st Street Newsstand to Jackson's Used Auto Engines; (4) Joseph Hazelwood and (5) Petitioner Jackson, who are connected with Jackson's Used Auto Engines, Inc.

The courts have held that two separate alleged gambling operations may be considered together to satisfy the jurisdictional five-person requirement; see generally United States v. Clements, supra, 588 F.2d at 1037-38, but there must be a connection or "nexus" between

them. Id.; United States v. Boyd, 566 F.2d 929, 934-35 (5th Cir. 1978). Here the testimony of Robert Prime, the Government's informant, was essential to establish such a link and, therfore, satisfy the five-person requirement.

Edwardo Lowrey, who testified that he picked up a package from co-defendant McKenzie and delivered it to Jackson's Used Engine Sales (App. at 108-130), had been promised immunity by the Government in exchange for testifying. Therefore, the testimony of Robert Prime was the only consideration for the alleged link between the 21st Street Newsstand and Jackson's Used Auto Engines.

On February 15, 1980, the Petitioner was found guilty of violating 18 U.S.C. Section 1955. On April 9, 1980, at the sentencing proceedings, counsel for the Petitioner made an oral motion for a new

trial on the basis of newly-discovered evidence relating to the credibility of Robert Prime, the Government's informant-witness. The evidence indicated that, at a point in time near that when he testified against the Petitioner, Prime, who was employed as a corrections officer, had admitted making false allegations concerning charges which he had made about irregularities at two Virginia corrections facilities. Counsel for the Petitioner submitted newspaper articles documenting this in support of the motion for new trial. (App. at 236-37.) The Petitioner's motion was denied by the trial court (App. at 232.)

Fed. R. Crim. R. 33 provides that "(t)he court on motion of a defendant may grant a new trial to him if required in the interest of justice". To warrant granting a motion for new trial based on

newly-discovered evidence, it must be shown (1) that the evidence was discovered since the trial; (2) that the evidence could not have been discovered earlier with the exercise of due diligence; (3) that the evidence is not merely cumulative or impeaching; and (4) that the evidence is so material that it probably would produce a different verdict. United States v. Carlone, 603 F.2d 63, 66 (8th Cir. 1979).

These prerequisites have been met in the present case in light of the facts that the evidence was discovered after the trial had ended and counsel for the Petitioner demonstrated at the hearing that he had exercised due diligence in the discovery of the evidence: counsel had learned of Prime's falsehoods on April 4, 1980, when co-defendant Hazelwood brought the newspaper articles to

his attention. (App. at 231-32.)

Although the general rule is to the effect that a showing that a witness has made untruthful statements subsequent to a trial is usually not enough to justify the granting of a new trial under Rule 33, see, e.g., United States v. Garrison, 296 F.2d 461 (7th Cir. 1961), cert. denied, 369 U.S. 804 (1962), in "flagrant cases" such relief may properly be granted. 2 Wright and Miller, Federal Practice and Procedure: Criminal Section 557 at 523 (1969).

For example, in Mesarosh v. United States, 352 U.S. 1 (1956), a prosecution alleging that defendants had conspired to violate the Smith Act, this Court held that false testimony given concurrently before a Senate Committee by a paid informer, who has testified for the Government concerning activities of

Communist conspiracy in the Smith Act trial so "tainted" his trial testimony as to require a reversal of the defendants' convictions and the granting of a new trial. As Chief Justice Warren stated, the informer, by his testimony, has "poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity". Id. at 14. This Court ordered that the convictions be reversed because it could not "be determined conclusively by any court that (the) testimony was insignificant in the general case against the defendants". Id. at 10-11.

In Williams v. United States, 500 F.2d 105 (9th Cir. 1974), a narcotics prosecution, the court ordered that the defendant was entitled to a new trial by reason of tainted, material testimony which had been given by a government

agent who was subsequently convicted of perjury in connection with another investigation similar in nature and contemporaneous in time. The facts indicate that the government's chief witness was undercover agent Jackson, who testified that he met with defendant Williams to arrange the heroin deal. Agent Watson (who was subsequently convicted of perjury) "served to corroborate Jackson's testimony in important respects". Id. at 107. In reversing the defendant's conviction, Judge Duniway stated:

> "Watson was an important witness in the government's case against Williams. He provided the only corroboration of Jackson's testimony that Williams was involved in the first transaction. Without his testimony the jury might not have been convinced

that there was enough evidence to find Williams guilty beyond a reasonable doubt. "Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case." Mesarosh v. United States, supra, 352 U.S. at 12, 77 S.Ct. at 7.

A conviction based substantially upon tainted evidence cannot stand. Mesarosh v. United States, supra, 352 U.S. at 14, 77 S.Ct. at 1. Watson was the government's agent. He was charged by the government with perjury and convicted of an act perpetrated in an investigation similar, in nature and contemporaneous in time, to the investigation of

Williams. The government itself prosecuted Watson and thereby impugned his integrity and credibility. Williams is entitled to a new trial." United States v. Davis, 10 Cir., 1973, 473 F.2d 1023, 1025. Id. at 107-08. See also United States v. Lipowski, 423 F. Supp. 864, 866-67 (D.N.J. 1976).

In the present case, the Government informant, Robert Prime, was an important witness in the Government's case against the Petitioner. His was the only testimony collaborating the statements of Edwardo Lowrey (who had been given immunity from prosecution) that he had transported a brown paper bag on several occasions from the 21st Street Newsstand to Jackson's Used Auto Engines. Without his testimony,

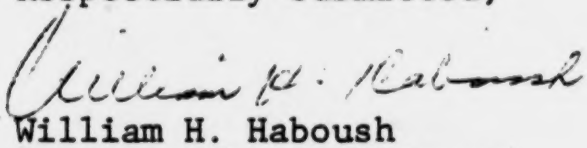
the jury "might not have been convinced," Williams v. United States, supra, 500 F. 2d at 107, that there was sufficient evidence of the alleged conviction between the two alleged gambling operations, which would have meant that the Government's case failed to meet the five-person requirement of 18 U.S.C. Section 1955.

Therefore, the newly-discovered evidence meets the fourth test-"that the evidence be so material that it probably would produce a different verdict," United States v. Carlone, supra, 603 F.2d at 66, hence, this Court should find that the trial judge erred in denying the Petitioner's motion for a new trial under Fed. R. Crim. R. 33.

CONCLUSION

Based on the foregoing, the Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,



William H. Haboush
Attorney for Petitioner
2120 Staples Mill Road
Richmond, Virginia 23230
(804)257-7229

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-5052

United States of America,
Appellee,

v.

David Carson Jackson,
Appellant.

No. 80-5053

United States of America,
Appellee,

v.

Margaret Frances McKenzie,
Appellant.

Appeals from the United States District Court for the Eastern District of Virginia,

at Newport News. J.Calvitt Clarke, Jr., District Judge.

Argued January 9, 1981
Decided February 13, 1981

Before WINTER, WIDENER, and SPROUSE, Circuit Judges.

Alvin B. Fox (Louis Ellenson on brief) and William H. Haboush (on brief) for Appellant; Raymond A. Jackson, Assistant U.S. Attorney (Justin W. Williams, U.S. Attorney, Jeffrey L. Tarkenton, Third Year Law Student on brief) for Appellee.

PER CURIAM:

Defendants were convicted of operating an illegal gambling business in violation of 18 U.S.C. Section 1955 (1976). They appeal contending that the evidence was legally insufficient to support the verdicts and especially that the jurisdictional requirements of Section 1955 were not proved. They also claim reversible error in the district court's denial of their motion for a new trial based upon newly dis-

covered evidence. We affirm.

We have examined the evidence and we are satisfied that the jurisdictional requirements of Section 1955 were met. Viewed in the light most favorable to the government, the evidence showed that defendants (a) conducted a numbers game in violation of state law, (b) involving five or more persons who participated in the enterprise as managers, owners or persons conducting operations, and (c) that the operation was substantially continuous for a period in excess of thirty days. Thus the guilty verdicts had a sound evidentiary and jurisdictional base.

The newly discovered evidence, at most, constituted general impeachment of a government informer. A new trial was not required. See United States v. McCoy, 478 F.2d 846 (4 Cir. 1973).

AFFIRMED.

CERTIFICATE

In accordance with Rule 33 of the Rules of the Supreme Court of the United States, I hereby certify that I have this the 12th day of March, 1981, filed the required copies of Petitioner's petition for Writ of Certiorari in the Clerk's Office in Washington, D.C. and have mailed the required copies of said petition for Writ of Certiorari to Raymond A. Jackson, Assistant United States Attorney, P.O. Box 60, Norfolk, Virginia, 23501.

William H. Haboush
Attorney for Petitioner